Supreme Court, U. S.
FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM 1977

No. 77-1694

BENJ. FRANKLIN FEDERAL SAVINGS AND LOAN ASSOCIATION,
a corporation,

Petitioner,

v.

DERENCO, INC.,
a Nevada corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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ARGUMENT

1. Jurisdiction

The judgment of the Oregon Supreme Court, which modified and affirmed an order requiring petitioner to account for profits on reserve accounts at passbook rates (Pet. 76), is reviewable under § 1257(3). While it contemplates that the accounting will take

place in the trial court (Pet. 75),[1] the judgment determined petitioner's liability to the class, and it is not subject to review or reconsideration in any state court. What remains is not a trial of substantive issues, but only to process the claims of individual claimants, which may be protracted but is, in the end, largely mathematical. The prospect of such proceedings, which characterize any successful class action and are unrelated to the federal question, does not prevent this Court from reviewing the judgment.

Section 1257 is given a practical rather than a technical construction, *Cox Broadcasting Corp.*, v. *Cohn*, 420 U.S. 469, 477-478 (1975), and the essential predicate of finality is that

> "[T]he federal questions that could come here have been adjudicated by the State court, and . . . the accounting which remains to be taken could not remotely give rise to a federal question." *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 127 (1945).[2]

In *Derenco*, the federal issues have all been decided by the Oregon Supreme Court, and an accounting to individual claimants under its judgment will not create new ones, but will involve only local law.

A second controlling consideration is that petitioner has no defense to respondent's class claims ex-

[1] The Oregon Supreme Court has stayed its mandate until this Court rules on the petition.

[2] See also *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U.S. 156, 163 (1973); *Cox Broadcasting Corp.* v. *Cohn*, supra, 420 U.S. 469, 477-478 (1975).

cept the federal issue raised in its petition, and the judgment sought to be reviewed dictates the outcome of any further proceedings in the lower state court. *Cox Broadcasting Corp.* v. *Cohn*, supra, 420 U.S. 469, 478-479 (1975); *Mills* v. *Alabama*, 384 U.S. 214, 217-218 (1966). This Court has repeatedly sustained its jurisdiction where a state court decision erroneously rejecting a claim of federal preemption leaves "nothing more of substance" to be decided in the lower state court. *Construction Laborers* v. *Curry*, 371 U.S. 542, 551 (1963); see also *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953); *Hudson Distributors* v. *Eli Lilly*, 377 U.S. 386 (1964).

The Oregon Supreme Court rejected petitioner's defenses to the claims of the class, including its preemption defense. While questions could arise in an accounting over the standing of a claimant or the exact amount due him, such assumed conflicts focusing on one or more individual claims are marginal and would not affect the judgment or the certainty of substantial liability in that proceeding. In addition, the preemption question controls petitioner's liability to all of the claimants, and an accounting under the Oregon court's judgment would not resolve federal issues raised by the petition; they would necessarily "survive and require decision." *Cox Broadcasting Corp.* v. *Cohn*, supra, 420 U.S. 469, 480 (1975).[3]

[3] Cf. *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948) in which there was a reasonable likelihood that the federal issue would be resolved in the course of further proceedings in state court.

Finally, the chance that petitioner might prevail on nonfederal grounds as to one or more individual claims among the thousands included in the class does not make the judgment nonfinal. In *Cox Broadcasting Corp.* v. *Cohn*, supra, 420 U.S. 469 (1975) the Court said:

> "The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all." 420 U.S. at 485.

See also *Shaffer* v. *Heitner*, 433 U.S. 186, 195-196, n 12 (1977), *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, supra, 414 U.S. 156, 162-163 (1973).

This "pragmatic approach" to § 1257 is of particular importance where, as in this case, reversal on the federal issue would terminate the litigation and to defer review "might seriously erode federal policy." *Cox Broadcasting Corp.* v. *Cohn*, supra, 420 U.S. 469, 482-483 (1975). Persistent attacks in many states upon the Board's exclusive authority to regulate federal saving and loan associations,[4] and the Oregon court's broad claim of local jurisdiction over

[4] In this connection, see cases cited in the *amicus curiae* brief of the State of California et al, at p. 2.

their affairs strongly suggest that the issues in this case should be resolved quickly.[5]

2. Reply to Respondent's Statement of Questions Presented and Statement of the Case

a. The questions presented are those stated in the petition (at p. 2), which go beyond the preemptive effect of the Board's regulation.

b. Respondent states that since 1958 the Board's regulation "has permitted, but has not required, the collection of reserve payments." Resp. Br. 5, citing 12 C.F.R. § 545.6-11. The regulations require tax reserve accounts for all loans of more than 80% of the value of the security. In 1974 petitioner had about 6,500 such loans. See Pet. 5, n 2; 12 C.F.R. § 545.6-1(a)(4)(iii).

3. Reply to Respondent's Statement of Reasons for Denying the Writ

a. The Oregon court (577 P.2d at 483; Pet. 32-33) and respondent (Resp. Br. 10-11) both conclude that imposing liability to account for profits on re-

[5] Other cases cited by respondent do not support its jurisdictional objection. In *Sand Springs Home* v. *Naharkey*, 299 U.S. 588 (1936) the Oklahoma Supreme Court remanded the suit for a new trial, in which an accounting was to be only "[o]ne phase." 177 Okla. 371, 59 P.2d 289, 293 (1936). *Market Street R. Co.* v. *Comm'n.*, 324 U.S. 548 (1945) did not involve the same issue

serve accounts will not substantially interfere with Congress' plan for regulating federal associations.

In fact, the retroactive[6] liabilities that would be imposed on petitioner and other federal associations by the decision are very large. Money liabilities under state law are a significant form of regulation which can interfere with federal policy, *San Diego Unions* v. *Garmon*, 359 U.S. 236, 247 (1959), and the decision impairs Congress' purpose by undermining a regulatory authority that it intended to be comprehensive and uniform, based on "the best practices of local mutual thrift and home-financing institutions of the United States." 12 U.S.C. § 1464(a); see also 12 U.S.C. § 1425b. The Oregon court's attack on the Board's supervision of federally-chartered associations raises an important question which this Court should review.[7]

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[6] The unfairness of unfunded, retroactive liabilities to a large class of claimants was recognized in *Allied Structural Steel Company* v. *Spannaus*, (U.S.) 46 L.W. 4887 (1978), in which a Minnesota pension reform statute was held invalid under the Contract Clause.

[7] A similar Congressional purpose in regulating labor relations was recognized in *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971). In *Greenwald* v. *First Fed. Sav. & Loan Ass'n of Boston*, (D.C. Mass. 1978) 446 F. Supp. 620, 624 (on appeal), Judge Caffrey held that a Massachusetts statute requiring interest payments on escrow tax accounts was preempted by federal law and regulation. In *Federal National Mortgage Ass'n* v. *Lefkowitz*, (S.D. N.Y. 1975) 390 F. Supp. 1364 (Resp. Br. 16) the district court applied a state statute requiring interest on escrow accounts to mortgages purchased by FNMA from private lenders. It concluded that the statute only regulated "a legal relationship antecedent to federal involvement" to which FNMA was not a party. 390 F. Supp. at 1371.

b. Cases cited by respondent (Resp. Br. 7-15) show only that the controlling consideration in preemption cases is Congressional intent, which can be demonstrated in many ways showing "from the totality of the circumstances" that Congress "sought to occupy the field to the exclusion of the States." *Malone* v. *White Motor Corp.*, (U.S.) 46 L.W. 4295, 4297 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 10, 1978

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